House of Lords

Horton v Sadler and another*

[2006] UKHL 27

2006 May 8, 9; June 14

Lord Bingham of Cornhill, Lord Hoffmann, Lord Rodger of Earlsferry Lord Carswell and Lord Brown of Eaton-under-Heywood

Limitation of action - Personal injuries - Time limit, power to override - Claimant injured by uninsured defendant in road traffic accident - Action begun against Motor Insurers' Bureau within limitation period - Bureau denying liability based on claimant's failure to give required notice - Second action begun after expiry of time limit - Whether discretion to disapply limitation period in respect of second action - Limitation Act 1980 (c 58), ss. 11, 33

Judicial precedent - House of Lords decisions - How far binding - Longstanding decision attracting sustained criticism - Whether justification to depart from decision

In April 1998 the claimant was injured in a road traffic accident for which the first defendant, who was uninsured, was responsible. The Motor Insurers' Bureau nominated insurers to act as its agents and in October 1998 made the claimant an interim payment. In April 2001, immediately before expiry of the three-year limitation period provided by section 11 of the Limitation Act 1980[1], the claimant's solicitors issued proceedings against the first defendant but failed to give the bureau the notice required as a condition precedent to liability under the Compensation of Victims of Uninsured Drivers Agreement 1988. The bureau, on being joined as a party, denied liability in reliance on non-compliance with the notice condition and sought the return of the interim payment. In September 2001 the claimant began a second action against the first defendant but gave the required notice to the bureau which, when joined as second defendant, resisted liability on the ground that the second action was time-barred under section 11 of the 1980 Act. The claimant applied to the court for

1. Limitation Act 1980, ss 11, 33: see post, paras 7, 59.

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an order disapplying the time limit under section 33 of the 1980 Act. On trial of preliminary issues the judge concluded that the bureau was under no liability in the first action and directed repayment of the interim payment. With regard to the second action he considered that he was bound by a previous decision of the House of Lords to the effect that where a claimant issued proceedings within the ordinary limitation period he was not prejudiced by section 11 and could not therefore invoke section 33 to disapply its application to a second action brought after expiry of the time limit. He accordingly ruled that although he would have exercised discretion under section 33 in the claimant's favour, he was precluded from doing so. The Court of Appeal dismissed the claimant's appeal without hearing argument.

On appeal by the claimant and cross-appeal by the bureau:

Held, allowing the appeal and dismissing the cross-appeal, (1) that on its true construction section 33 of the 1980 Act conferred a wide and unfettered discretion empowering the court to disapply the application of section 11 where it appeared equitable to allow an action to proceed, having regard to the degree to which the parties would be prejudiced and taking into account all the circumstances of the case and the matters listed in section 33(3); that "an action" in section 33(1) denoted any proceedings brought after expiry of the limitation period and it was prejudice to the claimant by application of section 11 to that action to which section 33(1) referred and that action to which the court's exercise of discretion might be directed; that the relevant action, therefore, was not that which the claimant brought within time and in respect of which he suffered no prejudice by section 11 but rather the second action begun after expiry of the time limit when he was prejudiced by its defeat under section 11; and that the previous decision of the House, in constraining the exercise of the section 33 discretion by a technical rule, was inconsistent with the correct interpretation of that provision (post, paras 9, 17, 21-23, 26-28, 32, 39, 42, 49-51, 58, 63, 65).

(2) That although the House would rarely exercise its power to depart from its previous decisions it would do so where too rigid an adherence to precedent might lead to individual injustice or unduly restrict the development of the law; that since the reasoning of the earlier decision was unsound, since it was productive of anomalies which lacked principled justification and had compelled appellate courts to draw fine distinctions which

reflected no credit on the law, and since it subverted Parliament's intention as understood by clear legislative terms and unfairly deprived claimants of the right it conferred, the House would exercise its power to depart from the decision (post, paras 24-25, 28-29, 31, 40-41, 49-51, 58, 63-65).

(3) That having regard to the judge's reasoning and to the factors on which he would have based his exercise of discretion, properly including the parties' insurance position, effect would be given to his judgment in the claimant's favour; and that, accordingly, the case would be remitted to the county court (post, paras 34-35, 38-39, 49-51, 54-58).

Walkley v Precision Forgings Ltd [1979] 1 WLR 606, HL (E) departed from.

Decision of the Court of Appeal [2004] EWCA Civ 936 reversed.

The following cases are referred to in the opinions of their Lordships:

Adams v Ali [2006] EWCA Civ 91; [2006] 1 WLR 1330, CA
Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229; [1968] 2 WLR 366; [1968] 1 All ER 543, CA
Cartledge v E Jopling & Sons Ltd [1963] AC 758; [1963] 2 WLR 210; [1963] 1 All ER 341, HL(E)
Chappell v Cooper [1980] 1 WLR 958; [1980] 2 All ER 463, CA
Corbin v Penfold Metallising Co Ltd [2000] Lloyd's Rep Med 247, CA
Das v Ganju [1999] Lloyd's Rep Med 198, CA
Deerness v John R Keeble & Son (Brantham) Ltd [1983] 2 Lloyd's Rep 260, HL(E)
Donovan v Gwentoys Ltd [1990] 1 WLR 472; [1990] 1 All ER 1018, HL(E)
Finch v Francis (unreported) 21 July 1977, Griffiths J
Firman v Ellis [1978] QB 886; [1978] 3 WLR 1; [1978] 2 All ER 851, CA
Forward v Hendricks [1997] 2 All ER 395, CA
Hartley v Birmingham City District Council [1992] 1 WLR 968; [1992] 2 All ER 113, CA
Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666, CA
McEvoy v AA Welding and Fabrication Ltd [1998] PIQR P266, CA
Piggott v Aulton, decd [2003] EWCA Civ 24; [2003] RTR 540, CA

Practice Statement (Judicial Precedent) [1966] 1 WLR 1234; [1966] 3 All ER 77, HL(E)
Public Trustee v Inland Revenue Comrs [1960] AC 398; [1960] 2 WLR 203; [1960] I All ER 1, HL(E)
R v G [2003] UKHL 50; [2004] 1 AC 1034; [2003] 3 WLR 1060; [2003] 4 All ER 765, HL(E)
R v National Insurance Comr, Ex p Hudson [1972] AC 944; [1972] 2 WLR 210; [1972] 1 All ER 145, HL(E)
Rose v Express Welding Ltd (unreported) 21 January, 1986; Court of Appeal (Civil Division) Transcript No 31 of 1986, CA
Shapland v Palmer [1999] 1 WLR 2068; [1999] 3 All ER 50, CA
Silverton v Goodall and Motor Insurers' Bureau [1997] PIQR P451, CA
Thompson v Brown [1981] 1 WLR 744; [198I] 2 All ER 296, HL(E)
Walkley v Precision Forgings Ltd [1978] 1 WLR 1228; [1979] 1 All ER 102, CA; [1979] 1 WLR 606; [1979] 2 All 548, HL(E)
White v Glass The Times, 18 February 1989; Court of Appeal (Civil Division) Transcript No 140 of 1989, CA
Whitfield v North Durham Health Authority [1995] PIQR P361, CA
Workvale Ltd, In re [1992] 1 WLR 416; [1992] 2 All ER 627, CA
Young, decd v Western Power Distribution (South West) plc [2003] EWCA Civ 1034; [2003] 1 WLR 2868, CA

The following additional cases were cited in argument:

A v Hoare [2006] EWCA Civ 395; [2006] 1 WLR 2320, CA
Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA
Ashingdane v United Kingdom (1985) 7 EHRR 528
Birkett v James [1978] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801, CA and HL(E)
Broome v Cassell & Co Ltd [1972] AC 1027; [1972] 2 WLR 645; [1972] 1 All ER 801, HL(E)
Burrows v United Kingdom (Application No 27558/95) (unreported) 27 November 1996, EComHR
Gurtner v Circuit [1968] 2 QB 587; [1968] 2 WLR 668; [1968] 1 All ER 328, CA
Hess v Labouchere (1898) 14 TLR 350, CA
Hunter v Earnshaw [2001] PNLR 982
Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II) [2004] UKHL 49; [2005] 1 WLR 1363; [2005] 1 All ER 175, HL(E)

A *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)
Kitchen v Royal Air Force Association [1958] 1 WLR 563; [1958] 2 All ER 241, CA
Liff v Peasley [1980] 1 WLR 781; [1980] 1 All ER 623, CA
B *M v Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)
Simpson v Norwest Holst Southern Ltd [1980] I WLR 968; [1980] 2 All ER 471, CA
C *Spectrum Plus Ltd, In re* [2005] UKHL 41; [2005] 2 AC 680; [2005] 3 WLR 58; [2005] 4 All ER 209, HL(E)
Steeds v Peverel Management Services Ltd [2001] EWCA Civ 419; The Times, 16 May 2001, CA
Stubbings v United Kingdom (1996) 23 EHRR 213
D *Stubbings v Webb* [1993] AC 498; [1993] 2 WLR 120; [1993] 1 All ER 322, HL(E)
White v White [2001] UKHL 9; [2001] 1 WLR 481; [2001] 2 All ER 53, HL(E)

E **APPEAL** from the Court of Appeal

The claimant, Anthony Horton, appealed with leave of an Appeal Committee of the House of Lords (Lord Hope of Craighead, Lord Carswell and Lord Brown of Eaton-under-Heywood) granted on 18 October 2004, and the second
F defendant, the Motor Insurers' Bureau, cross-appealed with permission of the Court of Appeal (Jonathan Parker and Scott Baker LJJ) granted on 1 March 2005 from their dismissal on 28 July 2004 of the claimant's appeal from judge Roger Cooke sitting at Salford County Court who, on 7 May 2003, on the trial of
G preliminary issues dismissed the claimant's first action for damages for personal injury against the first defendant, Darren Sadler, and the second defendant; and (2) ruled that he had no power to disapply the limitation period in respect of the claimant's second action in respect of the same cause of action against the same
H parties.

The facts are stated in the opinion of Lord Bingham of Cornhill.

Edward Bartley Jones QC and *Michelle Mayoh* for the claimant.
I In enacting the predecessor provisions to section 33 of the Limitation Act 1980 Parliament did not accept the Law Commission's recommendation that the discretion to override the

limitation period should only apply in a residual and exceptional class of case: see Report of the 20th Committee (Interim Report on Limitation of Actions in Personal Injury Claims) (1974) (Cmnd 5630). Instead the provision has always borne a wide and unrestricted interpretation: see *Firman v Ellis* [1978] QB 886; *Walkley v Precision Forgings Ltd* [1978] 1 WLR 886 and *Birkett v James* [1978] AC 297.

The effect of the rule in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606, and applied in *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260, is to confine the operation of section 33 of the Limitation Act 1980 so as to preclude, save in exceptional circumstances, a second action being brought outside the limitation period when an action begun within it was not pursued. The rule derives from the incorrect analysis that it is not section 11 of the Act which prejudices the claimant, within the meaning of section 33, but the claimant's own self-inflicted wound in allowing the first action to fail.

On a true construction the effect of section 11 is to provide the defendant with a limitation defence in any proceedings brought after expiry of the three-year time limit. In considering whether to disapply section 11 under section 33(1)(a) so as to permit "an action" to proceed the court directs its attention to second action. There is nothing inherently bad in the second action. Where an action has failed a second action can be validly commenced and pursued within the primary limitation period. But if it were commenced outside that period section 11 would prejudice its continuance.

The ruling in the *Walkley* case has been productive of anomalies and distinctions which are indefensible: see *Thompson v Brown* [1981] 1 WLR 744; *Chappell v Cooper* [1980] 1 WLR 958; *Simpson v Norwest Holst Southern Ltd* [1980] 1 WLR 968; *Forward v Hendricks* [1997] 2 All ER 395; *Whitfield v North Durham Health Authority* [1995] PIQR P361; *Piggott v Aulton, decd* [2003] RTR 540; *In re Workvale Ltd* [1992] 1 WLR 416; *Rose v Express Welding Ltd* (unreported) 21 January 1986; Court of Appeal (Civil Division) Transcript No 31 of 1986; *McEvoy v AA Welding and Fabrication Ltd* [1998] PIQR P266; *White v Glass,* The Times, 18 February 1989; Court of Appeal (Civil Division) Transcript No 140 of 1989; *Shapland v Palmer* [1999] 1 WLR 2068; *Young decd v Western Power Distribution (South West) plc* [2003] 1 WLR 2868;

A *Adams v Ali* [2006] 1 WLR 1330; *R v National Insurance Comr, Ex p Hudson* [1972] AC 944; *A v Hoare* [2006] 1 WLR 2320 and *Stubbings v Webb* [1993] AC 498.

Because of the principle of certainty a high threshold must be
B passed before the House will depart from its previous decision. However, it must be recognised that too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the law: see *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; *Kay v Lambeth London*
C *Borough Council* [2006] 2 AC 465; *Broome v Cassell & Co Ltd* [1972] AC 1027; *R v G* [2004] 1 AC 1034; *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2005] 1 WLR 1363 and *In re Spectrum Plus Ltd* [2005] 2 AC 680. Since the *Walkley* rule has been shown to produce unjust
D results and to cut down the unfettered discretion conferred on the court by section 33 the decision ought no longer to be followed.

Since it is improbable that article 1 of the First Protocol to the European Convention is engaged (see *M v Secretary of State for*
E *Work and Pensions* [2006] 2 AC 91 and *Burrows v United Kingdom* (Application No 27558/95) (unreported) 27 November 1996), the claimant's complaint of infringement of his human rights is concerned with article 6 alone. The right of unimpeded access to the court is not absolute, but any restriction imposed on it must
F pursue a legitimate aim and comply with the principles of proportionality and legal certainty: see *Stubbings v United Kingdom* (1996) 23 EHRR 213. A restriction cannot be proportionate if it impairs the very essence of the right protected: see *Ashingdane v United Kingdom* (1985) 7 EHRR 518. The restriction which
G impedes access to the court is not section 11 but the rule in *Walkley*. Its operation, in enabling a certain class of claimant (those who does not begin his action within the primary period) to take the benefit of section 33, amounts to differential treatment which has no objective and reasonable justification.

H In any event the decision can be distinguished on its facts: see *Silverton v Goodall and Motor Insurers' Bureau* [1997] PIQR P451 and *Gurtner v Circuit* [1968] 2 QB 587.

The judge's indication of how he would have exercised his
I discretion showed no misdirection. He also correctly concluded that the fault on the part of the claimant's solicitors was not to be attributed to the claimant, and he identified the existence of a

professional negligence claim against the solicitors as a factor to be taken into account in weighing the degree of prejudice to be suffered by the claimant if a section 33 direction were not made: see *Steeds v Peverel Management Services Ltd* The Times, 16 May 2001; *Das v Ganju* [1999] Lloyd's Rep Med 198 and *Corbin v Penfold Metallising Co Ltd* [2000] Lloyd's Rep Med 247. It is, however, fallacious to assume that in a subsequent professional negligence claim the claimant will necessarily recover the same amount as he would have done in the original action: see *Kitchen v Royal Air Force Association* [1958] 1 WLR 563; *Hunter v Earnshaw* [2001] PNLR 982; *Hartley v Birmingham City District Council* [1992] 1 WLR 968 and *Jackson & Powell, Professional Negligence*, 5th ed (2002), para 10-283.

The claimant did not have to discontinue the first action unless and until the court had ruled on whether the second action could proceed. Maintenance of both actions before the judge was not an abuse of process. However, if the second action is permitted to proceed the right course would be to discontinue the first action.

Dermod O'Brien QC and *Clare Brown* for the bureau. The settlement between the claimant and his solicitors could entitle the latter to exercise a remedy by way of subrogation against the defendant. The effect of that would be to make the appeal hypothetical since, even if the solicitors were able to prosecute the second action to judgment in the claimant's name, the bureau would still not be obliged to pay the claim: see clause 6(1)(c) of the Compensation of Victims of Uninsured Drivers Agreement 1988. The House should consider whether it would deal with a hypothetical case.

The conditions to be satisfied before the House will depart from *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606 under the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 are not met. The decision is of long-standing, has remained unchanged in consolidating legislation and accords with recommendations of the Law Commission: see the Report of the 20th Committee (1974) (Cmnd 5630) and the Report on Limitation of Actions in Cases of Personal Injury (the Edmund Davies Committee) (1962) (Cmnd 1829). Only in rare cases should the House reconsider its own decisions on questions of statutory construction: see *R v National Insurance Comr, Ex p Hudson* [1972] AC 944 and *R v G* [2004] 1 AC 1034. Any amendment should be left to Parliament.

A The question asked and answered negatively by the House in *Walkley* was whether a plaintiff who had in fact brought an action within the limitation period could claim that he was prejudiced by the prohibition in section 11(3) against bringing another action after the time limit had expired: the plaintiff was not prejudiced by B section 11 but by the failure to pursue his remedy in the action he had brought. Section 33 is to be read in conjunction with section 11: unless and until the defendant elects to waive the effect of section 11(3) or the court exercises its powers under section 33, the second action is bad: see *Thompson v Brown* [1981] C 1 WLR 744; *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260.

A number of other authorities are to be distinguished on their facts; in most of them the failure to issue proceedings in time was D due to the acts or omissions of the claimants' lawyers: see *In re Workvale Ltd* [1992] 1 WLR 416; *Rose v Express Welding Ltd* 21 January 1986; Court of Appeal (Civil Division) Transcript No 31 of 1986; *McEvoy v AA Welding and Fabrication Ltd* [1998] PIQR P266; *White v Glass* The Times, 18 February 1989; Court of E Appeal (Civil Division) Transcript No 140 of 1989; *Shapland v Palmer* [1999] 1 WLR 2068; *Piggott v Aulton, decd* [2003] RTR 540; *Young, decd v Western Power Distributor (South West) plc* [2003] 1 WLR 2868 and *Adams v Ali* [2006] 1 WLR 1330.

F The criticism that *Walkley* might cause injustice rests on the mistaken assumption that the scope of section 33 should be available to make motorists' or employers' liability insurers the paying party in preference to the professional negligence insurers: see *Chappell v Cooper* [1980] 1 WLR 958. On the facts there is G no injustice to the claimant. However, departure from *Walkley* would result in injustice where, as here, the burden of compensating the claimant would be transferred away from the solicitors' insurers, who have accepted a premium against the relevant risk, namely the negligent failure to issue effective H proceedings within the limitation period; the risk would be transferred to the bureau who have collected no premiums at all and through them to the bulk of law-abiding motorists who do insure. Having regard to the statutory requirements in the insurance industry motor insurers will suffer serious prejudice by I such a departure whereas professional indemnity insurers will not. Motor insurers are obliged by law to write policies on an occurrence basis and cannot manage the risk of payments by the

bureau by increasing premiums. Professional indemnity insurers can manage the risk which can be underwritten on a "claims made" basis.

The rule in *Walkley* is not incompatible with the claimant's rights under article 6(1) of the European Convention on Human Rights. The claimant had and has still a right of full access to the court (see *Ashingdane v United Kingdom* 7 EHRR 528); he has received full compensation for his injuries by way of his solicitors' professional indemnity insurers so that his article 6 right has been satisfied without his having to go to court. In any event the right to institute proceedings is not absolute: see *Stubbings v United Kingdom* 23 EHRR 213. It is therefore legitimate for a court to say that where a first action has been issued in time but not proceeded with there is no obligation on the state to enable the claimant to bring a second action outside the limitation period in respect of the same cause of action against the defendant: see *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174. To maintain both actions would be an abuse of process: see *Hess v Labouchere* (1898) 14 TLR 350.

If section 33 applies at all the judge failed to have proper regard to the claimant's negligence claim against his solicitors. The reference to "any person whom [a claimant] or [a defendant] represents" in section 33(1)(a) and (b) includes the parties' insurers and their position is a factor for the court to consider. Those who underwrite motor liability risks and those who underwrite professional negligence risks do so with a view to profit; they are persons whom the claimant and the defendant represent for the purpose of section 33(1) and there should be no a priori assumption that justice requires the interests of one to be preferred to those of the other. There is no injustice in requiring professional indemnity insurers to pay for the risk for which they have taken a premium: see *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260. The court is obliged by section 33(3) to "have regard to all the circumstances of the case", and where, as here, the claimant recovers his damages no matter which way the discretion is exercised, the court must determine which of the parties should pay the damages.

The burden is on the claimant to satisfy the court that he has suffered prejudice such that it would be equitable to disapply the time bar; the evidence adduced must always be sufficient to displace the prejudicial effect to the defendant of losing an accrued

limitation defence. The evidence will be not be sufficient where it shows no more than that the solicitors' negligence led to the commencement of proceedings after expiry of the limitation period: see *Liff v Peasley* [1980] 1 WLR 781. The effect of disapplying section 11 will be that the claim will be satisfied improperly from premiums paid by motorists in compliance with their legal obligations: see *White v White* [2002] 1 WLR 481. Money subscribed to the bureau through its levy should not, as a matter of principle, be applied to relieve negligent solicitors and their insurers from the consequences of their failures.

Bartley Jones QC replied.

The defendant did not appear and was not represented.

Their Lordships took time for consideration.

14 June. **LORD BINGHAM OF CORNHILL**

1 My Lords, in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606 the House ruled that the court may not exercise its power to disapply the ordinary time limit in a personal injuries action under what is now section 33 of the Limitation Act 1980 where a claimant had issued proceedings in respect of those injuries before the ordinary time limit expired and has brought a second action (in which the application under section 33 is made) after expiry. In this appeal the House is invited by the appellant to depart from that ruling pursuant to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. The Motor Insurers' Bureau ("the MIB"), the only effective respondent, submits that the House should adhere to its decision.

The proceedings

2 On 12 April 1998 the appellant was injured in a road traffic accident for which the first defendant, Mr Sadler, was wholly responsible. Mr Sadler was not insured, as he should have been, against third party risks. The MIB nominated insurers to act as its agents and the appellant's solicitors corresponded with them. In October 2000 the MIB made an interim payment of £3,675 to the appellant. On 10 April 2001, two days before expiry of the three-year limitation period, the appellant's solicitors issued proceedings against Mr Sadler, but they then failed to comply with a condition precedent of MIB's liability under the agreement made between it and the Secretary of State for Transport by giving notice of the proceedings to MIB. Having been joined as a party

to the proceedings on its application, the MIB served a defence, in which it denied liability, relying on the failure to comply with the notice condition, and counterclaimed for return of the interim payment.

3 In September 2001 the appellant issued what were in effect duplicate proceedings against Mr Sadler. On this occasion the appellant gave the necessary notice to the MIB, which in October 2001, on its application, was joined as a party to the second action also. Its main defence was that the appellant's claim in the action was statute-barred by section 11 of the 1980 Act. The appellant responded by seeking an order disapplying the ordinary three-year time limit under section 33 of the 1980 Act. It was ordered that preliminary issues be tried as to the liability of the MIB in the first action and the disapplication of the ordinary time limit under section 33 in the second.

4 These issues were resolved in the Salford County Court by Judge Roger Cooke, who held that the MIB was under no liability in the first action and that the appellant should repay the interim payment he had received with interest. That ruling was not the subject of appeal. In the second action he ruled that he was precluded from exercising the power conferred on the court by section 33 by the decision of the House in *Walkley* [1979] 1 WLR 606, which was neither distinguishable nor incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms. But he went on to hold that had it been permissible for him to disapply the time limit under section 33 he would have exercised his discretion in favour of doing so.

5 The appellant appealed against the judge's decision in the second action, but authority binding on the Court of Appeal, in particular *Walkley*, compelled the dismissal of that appeal, which took place without argument on 28 June 2004. Permission to appeal was granted by the House. The MIB cross-appealed.

The MIB

6 The growth of motor traffic and the increasing number of accidents to which it gave rise prompted enactment of the Third Parties (Rights Against Insurers) Act 1930 and the Road Traffic Acts of 1930 and 1934, which made third party motor insurance compulsory and facilitated recovery against insurers where judgments were obtained against motorists who were in breach of policy conditions or whose policies were voidable. But this

A legislation did not address the problem which arose from injuries caused by motorists who could not meet a judgment and were not insured at all. This problem was resolved by what Sir Ralph Gibson in *Silverton v Goodall and Motor Insurers' Bureau* [1997] PIQR P451, 453-454, called "a novel piece of extra statutory B machinery": the formation by insurers writing motor business of the MIB as a company limited by guarantee, of which the insurers were members, to administer a fund provided by them (and ultimately by the general body of insured motorists) to compensate victims of accidents caused by uninsured drivers. The administration C of the scheme was governed by a series of agreements between the bureau and successive ministers or Secretaries of State for Transport, the first made in June 1946, the most recent (relevant to this case) on 21 December 1988. This last agreement gives effect to the obligations of the United Kingdom under the Second D Council Directive on Motor Insurance (84/5/EEC) of 30 December 1983. Clause 2 of the current agreement provides for the satisfaction of claims by the MIB. Clause 5(1) provides:

> MIB shall not incur any liability under clause 2 of this Agreement E unless – (a) notice in writing of the bringing of the proceedings is given within seven days after the commencement of the proceedings: (i) to MIB in the case of proceedings in respect of a relevant liability which is … not covered by a contract of insurance …

F This is the condition with which the appellant's solicitors did not comply in the first action.

Limitation in personal injuries actions

7 As enacted, section 2(1)(a) of the Limitation Act 1939 G provided that actions in tort should not be brought after the expiration of six years from the date on which the cause of action accrued. Despite the language used, this has not been taken to mean that the bringing of an action after that time is prohibited but that the defendant has a statutory defence of time-bar in such H a case. The period applicable to personal injury actions was shortened to three years by the Law Reform (Limitation of Actions, etc) Act 1954. There was, however, an obvious source of injustice, highlighted by *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, where the time limit expired before the victim knew of I his injuries. This problem was considered in the Report on Limitation of Actions in Cases of Personal Injury (the Edmund

Davies Committee) in 1962 (Cmnd 1829) and led to the Limitation Act 1963, which provided for the accrual of a claimant's cause of action to be deferred in such a case until his date of knowledge. That Act gave rise to acute problems of interpretation and application, and these were the subject of further consideration by the Law Reform Committee under the chairmanship of Orr LJ. In its 20th Report (Interim Report on Limitation of Actions: In Personal Injury Claims) (Cmnd 5630) May 1974, the Law Reform Committee proposed a reformulated date of knowledge test. It also, relevantly to this appeal, rejected the proposal that the court should have a general discretion to extend time in meritorious cases (paras 35, 56), but recommended (paras 56, 57, 69(4)) that "in a residual class of cases", regarded as "exceptional", the court should have a discretion to weigh the actual hardships on both sides and to allow an action brought out of time to proceed if the court were satisfied that it would be equitable to do so. In making this recommendation the committee's object was to promote strict application of the prescribed limitation rules by providing an exceptional means of accommodating very hard cases in which, but for the possibility of resorting to such means, courts might be persuaded to interpret the rules in a way which would strain their meaning or undermine their object.

8 The committee's date of knowledge recommendation was given effect in the Limitation Act 1975 by inserting a new section 2A into the 1939 Act and a discretionary power to extend time was enacted by inserting a new section 2D. These were substantially re-enacted as sections 11 and 33 of the 1980 Act. Section 33 is headed "Discretionary exclusion of time limit for actions in respect of personal injuries or death" and (as amended) provides in subsection (1):

> If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which – (a) the provisions of section 11 or 11A or 12 of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

A This is supplemented by subsection (3), which provides:

> In acting under this section the court shall have regard to all the circumstances of the case and in particular to – (a) the length of, and the reasons for, the delay on the part of the plaintiff; (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12; (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant; (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action; (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

9 In *Finch v Francis* (unreported) 21 July 1977, an early case on section 2D, Griffiths J, who had been a member of the Law Reform Committee and a contributor to its Report, ruled that "the object of the discretion was to provide for the occasional hard case" and that its application "should be reserved for cases of an unusual nature". Thus he interpreted section 2D as conferring the limited discretion which the committee had envisaged. But this interpretation was roundly rejected in *Firman v Ellis* [1978] QB 886, where the Court of Appeal gave judgment in four appeals under section 2D. In his judgment, at pp 903-905, Lord Denning MR recounted much of the history summarised above, noting the Law Reform Committee's rejection of the proposal that the court be given an unfettered general discretion to extend time and its recommendation of a discretion in some exceptional, residual classes of case. But, he held (p 905), section 2D had given the court a wide general discretion, not so limited. This was a "revolutionary step" which "alters our whole approach to time bars". Ormrod LJ agreed (p 910) that the section gave the court "the widest discretion". Judicial fetters should not be imposed on this new and valuable discretionary power. Geoffrey Lane LJ

(p 915) was similarly of opinion that section 2D could not properly be interpreted as conferring the more limited discretion recommended by the Law Reform Committee. A

Walkley

10 In all the four actions considered in *Firman v Ellis* [1978] QB 886, a writ had been issued within the three-year limitation period but had lapsed, and a second action had been brought in which an extension under section 2D was sought. It was not argued that the timely issue of the first writ precluded the exercise of the section 2D power, which the Court of Appeal upheld. B C

11 Mr Walkley was employed as a grinder from 1966 until about 1970-1971. Towards the end of 1969 he became aware of a complaint affecting his fingers. He consulted his trade union, whose legal department considered that he had no grounds for a common law claim for damages. The case was, however, referred to the union's solicitors in South Wales, a firm expert in this field, who negotiated with the employers' insurers. They repudiated liability. A writ was issued in October 1971 and an appearance entered, but no further steps were taken and the solicitors advised Mr Walkley in July 1972 that his claim had no chance of success. Mr Walkley consulted new solicitors who told the employers' solicitors in July 1973 that they were instructed to pursue the action, eliciting the response that if the action were pursued a summons would be issued to dismiss it for want of prosecution. No further steps in the action were taken and these solicitors ceased to act. Mr Walkley then consulted a third firm of solicitors, who obtained an engineer's report and a favourable opinion of counsel. A second writ was issued in December 1976 and served in February 1977. The employers then applied to the master for an order, which he made, striking out the second writ and dismissing the second action. Mr Walkley appealed to Swanwick J, asking that the second action be allowed to continue, in order that he could seek an extension of time under section 2D. The judge set aside the master's order, on Mr Walkley undertaking to discontinue the first action, but did not purport to exercise, nor did he refuse to exercise, the discretion conferred by section 2D. D E F G H

12 On the employers' appeal to the Court of Appeal [1978] 1 WLR 1228, they did not contend that section 2D could be construed as having no application to a case where a first writ had been issued within the three-year limitation period and that action I

had been discontinued or dismissed, a fact noted by Megaw LJ at p 1235. Megaw and Shaw LJJ concluded that even if the first action could and would have been struck out for want of prosecution, Mr Walkley was entitled to seek an extension under section 2D in the second action and it was not possible to conclude on the material before the court that his application was bound to fail. On this last point, Waller LJ dissented.

13 In their printed case on appeal to the House, the employers expressly advanced the argument which, as noted by Megaw LJ, they had not taken below, and on this ground they succeeded: [1979] 1 WLR 606.

14 Lord Wilberforce said, at p 609:

> My Lords, as a matter of principle I have very great difficulty in understanding how in this case or indeed in any case that I can imagine where an action has been started within the normal limitation period, section 2D can be invoked at all. The section opens with the words: '(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which – (a) the provisions of section 2A or 2B of this Act prejudice the plaintiff ...' The provisions of section 2A are those which require an action for personal injuries to be brought within three years. So subsection (1)(a) must be contemplating a case in which, because the three years have expired without an action being brought, section 2A applies to the prejudice of the plaintiff. But if the plaintiff has brought his action within the three years, how has he been prejudiced by section 2A? This I fail to understand. If this argument is sound, the respondent's case fails in limine. He brought his first action within the normal limitation period, and if he has suffered any prejudice, it is by his own inaction and not by the operation of the Act. However, since the Court of Appeal did not decide the case on this argument, or, it seems, consider it, and since the provision is a new one, understanding of which may have to come with time, I will consider the appeal on the assumption that these initial words may apply to the case.

He then considered the matters listed in section 2D(3) and concluded, in agreement with Waller LJ, that Mr Walkley's application could not succeed and the second action should therefore be dismissed.

15 Viscount Dilhorne expressed his reason for dismissing the second action, at p 614:

In my opinion this appeal should be allowed for it cannot be said that it was the provisions of section 2A (that is to say, the imposition of the three year period after which an action such as this cannot be proceeded with without the directions of the court) which prejudiced the respondent when within that period he brought an action for damages for the same personal injuries and in respect of the same cause of action as in his second action. He was prejudiced by his delay in proceeding with the first action and by his discontinuance of that action, not by the provisions of section 2A.

16 Lord Diplock ruled to similar effect, at p 619:

My Lords, in my opinion, once a plaintiff has started an action (the first action) within the primary limitation period it is only in the most exceptional circumstances that he would be able to bring himself within section 2D in respect of a second action brought to enforce the same cause of action. If the first action is still in existence, as it was in the instant case when the matter was before the master and the judge, cadit quaestio; he has not been prevented from starting his action by section 2A or section 2B at all, so the provisions of those sections cannot have caused him any prejudice. Does it make any difference that the first action is no longer in existence at the time of the application under section 2D either because it has been struck out for want of prosecution or because it has been discontinued by the plaintiff of his own volition? In my view, it does not. These are self-inflicted wounds. The provisions of section 2A caused him no prejudice at all; he was able to start his action. The only cause of the prejudice to him in the case of dismissal for want of prosecution is dilatoriness which took place *after* the action was started whether on his own part or on the part of his legal advisers. In the case of discontinuance the only cause of the prejudice is his own act. The only exception I have been able to think of where it might be proper to give a direction under section 2D, despite the fact that the plaintiff had previously started an action within the primary limitation period but had subsequently discontinued it, would be a case in which the plaintiff had been induced to discontinue by a misrepresentation or other improper conduct by the defendant; but there is no suggestion of this in the instant case. I would allow the appeal upon the ground that Mr Walkley, having previously started an action for the same cause of action within the primary limitation period prescribed by section 2A, cannot bring himself within section 2D at all. Any application by him under that section would fail in limine.

Lord Edmund-Davies and Lord Keith of Kinkel agreed with both Lord Wilberforce and Lord Diplock. So Mr Walkley's second action was dismissed.

Later authority of the House

17 The House has had occasion to consider section 2D and its successor, section 33, in two later cases. The first was *Thompson v Brown* [1981] 1 WLR 744. In that case the appellant's solicitors had negligently failed to issue a writ within the three-year limitation period. A writ was issued a month out of time and the appellant's application for an extension of time under section 2D was tried as a preliminary issue by Phillips J. He ruled against the appellant, holding that he was bound by Court of Appeal authority to find that the appellant had not been prejudiced by the time limit in section 2A since he had an unanswerable claim against his solicitors. There was a leapfrog appeal to the House, where Lord Elwyn-Jones, Lord Fraser of Tullybelton, Lord Scarman and Lord Bridge of Harwich agreed with the opinion of Lord Diplock. In this opinion Lord Diplock analysed the decision of the House in *Walkley*, observing (pp 749, 750) that because of the issue of the first writ in that case section 2A had not affected Mr Walkley at all, let alone prejudiced him. The only reason why section 2D did not apply to his case was because the primary limitation period had not expired when Mr Walkley had started his first action (p 751). Lord Diplock observed that exercise of the section 2D power must always be highly prejudicial to a defendant by depriving him of what would otherwise be a complete defence, although what the defendant lost where the application was made shortly after expiry of the primary limitation period might be regarded as being in the nature of a windfall (p 750). On the other hand, Lord Diplock thought it self-evident that expiry of the limitation period without issue of proceedings must always prejudice the plaintiff to some degree (p 750). This unanimous decision of the House is authority for three further propositions. First, while the outcome of the *Firman v Ellis* [1978] QB 886 appeals was wrong in the light of *Walkley*, the Court of Appeal had been right about the unfettered nature of the discretion conferred by section 2D: pp 752, 753. Secondly, while a plaintiff's right of full recovery against his negligent solicitor was always a highly relevant consideration in striking the balance required by section 2D, a view earlier expressed by the Court of Appeal in *Firman v Ellis* at p 909, it did not preclude exercise of the section 2D power in the plaintiff's favour, and the judge had

been wrong to rule otherwise: pp 752-753. Thirdly while it was anomalous that a defendant should be better off where a writ had been issued but not served (as in *Firman v Ellis*) than he would be if the writ had not been issued at all (as in *Thompson*), this was a consequence of the rule that an action is brought for limitation purposes when a writ is issued and not when it is served: pp 752-753. The case was remitted to the judge for him to consider whether the provisions of section 2A should be disapplied.

18 The second case was *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260. The plaintiff suffered very serious injuries as a passenger in a car, and a writ was issued within the three-year period against the driver and the owner of the car whose insurers made a substantial interim payment. But the writ was not served, nor renewed at the end of 12 months, and the limitation period expired without its renewal. A second writ was issued, the insurers relied on the section 11 time bar and the plaintiff sought an extension of time under section 33. Comyn J found exceptional grounds for granting an extension, despite *Walkley*, but the Court of Appeal held that the plaintiff's claim was statute-barred and the House endorsed this conclusion. Lord Edmund-Davies, Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Brightman expressed unqualified agreement with the leading opinion of Lord Diplock. In this opinion Lord Diplock rejected the judge's reliance on his reference in *Walkley* to "most exceptional circumstances", concluding that only an estoppel would suffice: p 262. In *Walkley* the House had ruled

> that a plaintiff who has actually started an action before the expiry of the primary limitation period has not been prejudiced by what are now the provisions of section 11 of the Limitation Act 1980 and therefore cannot bring himself within the provisions of section 33(1): p 262.

"The rationale of the rule laid down by this House in *Walkley*'s case did not logically admit of any exceptions": p 262. Further reference was made to the anomaly which Lord Diplock had acknowledged in *Thompson*: p 263.

Court of Appeal authority

19 The decision of the House in *Walkley* has been considered by the Court of Appeal in a number of cases, which may be divided into three broad classes. In the first class of case, the decision has been applied with no expression of disapproval.

A Examples are *Whitfield v North Durham Health Authority* [1995] PIQR P361, *Forward v Hendricks* [1997] 2 All ER 395 and *Young, decd v Western Power Distribution (South West) plc* [2003] 1 WLR 2868. Into the same class falls the unreported first instance decision of Judge McKenna in the Birmingham County Court (17 B February 2003) in *Morris v Lokass*. In the second class of case *Walkley* has been applied but with express reluctance. An example is *Chappell v Cooper* [1980] 1 WLR 958, 967-968, per Ormrod LJ. In the third class of case *Walkley* has been distinguished, as in *Rose v Express Welding Ltd* (unreported) 21 January 1986; Court C of Appeal (Civil Division) Transcript No 31 of 1986; *White v Glass* The Times, 18 February 1989; Court of Appeal (Civil Division) Transcript No 140 of 1989; *In re Workvale Ltd* [1992] 1 WLR 416; *McEvoy v AA Welding and Fabrication Ltd* [1998] PIQR P266; *Shapland v Palmer* [1999] 1 WLR 2068; *Piggott v Aulton, decd* D [2003] RTR 540; and *Adams v Ali* [2006] 1 WLR 1330. The detailed grounds relied on to distinguish *Walkley* in these cases are not in my opinion important: the significance of the decisions lies in the Court of Appeal's unwillingness to regard the ratio of *Walkley* as applicable to any case not on all fours with it and in E the disfavour with which the reasoning and decision in *Walkley* has in some of these cases been regarded. A number of Lords Justices plainly share the opinion of the Law Commission in its Report on Limitation of Actions (Law Com No 270) (10 July 2001), para 3.166, which the Government accepted in principle in July 2002, F subject to further consideration of certain aspects, and proposed to enact when a suitable opportunity should arise:

> However, we consider that some amendments should be made to the current form of the discretion [in section 33]. An artificial distinction exists under the current law between the claimant who G has not issued any proceedings within the limitation period (in which case the discretion applies), and the claimant who has issued proceedings, but failed to serve them within the limitation period (in which case the discretion does not apply).

H The authority cited by the Law Commission is *Walkley* [1979] 1 WLR 606.

The appellant's criticism of Walkley

20 Counsel for the appellant strongly criticised the decision of I the House in *Walkley*, contending (1) that the reasoning of the decision itself cannot be supported, (2) that the decision has given rise to indefensible distinctions, and (3) that the decision deprives

the court of the wide and unfettered discretion which the legislation was intended to give it. None of these contentions was accepted by counsel for the MIB, and it is necessary to consider each in turn. I shall for convenience refer only to the current sections, sections 11 and 33, even where their predecessor sections were in force at the time of a decision.

21 (1) Counsel for the appellant submitted that the effect of section 11 is to provide the defendant with a time limit defence in any proceedings brought after the expiry of the three-year period. When section 33(1) refers to consideration whether it would be equitable to allow "an action" to proceed it is referring to such an action. It is prejudice to the plaintiff by application of section 11 to that action to which section 33(1)(a) refers, and that action to which the court may direct that the provisions of section 11 shall not apply. Thus the question for the court under section 33 is always whether it is equitable or inequitable as between the parties to override the time bar which, if relied on by the defendant, will, unless disapplied by order of the court, defeat the action which the plaintiff has ex hypothesi brought out of time.

22 This analysis is, as I think, plainly correct. But the appellant contended that it could not readily be reconciled with the reasoning in *Walkley*. It was held there that the plaintiff, having issued a writ within the three-year period could not be prejudiced by section 11. But the action timeously brought by the plaintiff in *Walkley*, as in the *Firman v Ellis* [1978] QB 886 cases, could not be effectively pursued. The plaintiff could succeed only in his second action. To that section 11 provided a bar which prejudiced him by defeating his action. Section 11 did not prejudice the plaintiff in his first action, brought in time, but that was not the relevant action. When in *Thompson* [1981] 1 WLR 744 it was said, more than once, that section 11 did not affect Mr Walkley at all, this overlooked the fact that section 11 affected him, unless disapplied, by defeating his second action. The negligence of his solicitors gave rise to the need for a second action, but it was the time bar which meant that that action was bound to fail.

23 Despite the great eminence of those who gave judgment in *Walkley*, explained and distinguished that decision in *Thompson* and applied it in *Deerness* [1983] 2 Lloyd's Rep 260, I do not think there is any answer which can be given to the appellant's criticisms and counsel for the MIB provided none.

A **24** (2) The appellant relied on the fine distinctions drawn by the Court of Appeal in some of the cases cited above as evidence of the court's reluctance to apply *Walkley* in any case where it was not strictly constrained by that authority to do so, and in particular on the distinction, acknowledged by Lord Diplock to be
B anomalous, between cases where the plaintiff had issued proceedings within the primary limitation period, which had thereafter foundered for some procedural reason, and cases where no proceedings had been issued at all. There was no rational ground for concluding that a defendant should be vulnerable in
C the latter case, where the plaintiff's solicitor's negligence would probably be greater but not in the former case where it would probably be less. This was an anomaly caused not by the rule that proceedings are brought when the writ is issued, and not by the language of the statute, but by the decision in *Walkley*. In the
D result, the distinction lacked any principled justification.

25 I can, again, see no answer to this criticism, and I do not think counsel for the MIB was able to advance one.

E **26** (3) In reliance on *Firman v Ellis*, strongly affirmed on this point by the House in *Thompson,* the appellant contended that the legislation conferred a wide and unfettered discretion and that it was accordingly inconsistent with that interpretation to constrain the exercise of the section 33 discretion by technical rules such
F as that laid down in *Walkley*. This was to subvert the intention of Parliament to be derived from the terms of the legislation.

27 For the MIB it was pointed out that the Law Reform Committee in its 20th Report appears to have contemplated a more limited discretion. This is, I think, so. But the committee did
G not annex a draft bill to its report, so it cannot be said that the changes made in the 1975 Act were approved by it as giving faithful effect to its recommendation. While resort to materials such as the 20th Report is permissible to explain the purpose of a statute, identify the mischief at which it is directed and clarify an
H ambiguity in its language, such a report cannot ordinarily be relied on to qualify or override the terms of a statute which are themselves clear. Such, in my opinion, is the case here. Lord Denning's exposition of the statutory language in *Firman v Ellis* is to my mind persuasive. It was endorsed by the House in
I *Thompson*. It has never to my knowledge been questioned.

28 On this point also I would accept the thrust of the appellant's criticism. Mr Walkley's case for seeking an exercise of the section 33 discretion in his favour was, as Waller LJ rightly held, of the weakest. Thus the outcome of the case was clearly right. But I feel bound to conclude that the reasoning of the decision was unsound, that it has given rise to distinctions which disfigure the law in this area and that the effect has been to restrict unduly the broad discretion which Parliament conferred.

Departure

29 Over the past 40 years the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors. The House was referred to statements of principle found in such cases as *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966, 971-972, 973, 993, 995, 996, 1023-1025, and, more recently, *R v G* [2004] 1 AC 1034, paras 30-35. As made clear in the 1966 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 former decisions of the House are normally binding. But too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law. The House will depart from a previous decision where it appears right to do.

30 The MIB submitted that the conditions for departure were not satisfied in this case, even if the criticisms of *Walkley* were held to be justified. The decision affected a relatively small number of litigants whose second actions fell foul of the rule and who could therefore be expected, if they had ever had an arguable claim, to have a right of redress against their solicitors. Thus the risk of irreparable prejudice to any individual would be small. Commonly the "squabble" (as Lord Diplock called it in *Deerness* [1983] 2 Lloyd's Rep 260, 261) would be between the solicitor's indemnity insurers and the defendant driver's motor insurers to decide which should pay to the victim the damages to which he was entitled. It was pointed out that *Walkley* had now stood for 25 years; Parliament had not reversed its effect when consolidating the law in 1980; if Parliament wishes to give effect to the Law Commission's recommendation it can do so; the case for judicial intervention is not made out.

31 There is force in these arguments. But this is not a case in which contracts, settlements of property or fiscal arrangements have been entered into on the faith of a settled legal rule. The criminal law, where certainty is particularly important, will be unaffected if the House departs from *Walkley*. There will be no detriment to public administration. While injustice may bear more hardly on individuals, I do not regard the concept as inapplicable to judgments affecting corporations with competing interests. I would in the result depart from *Walkley* for three reasons, taken together: that it unfairly deprives claimants of a right Parliament intended them to have; that it has driven the Court of Appeal to draw distinctions which are in my opinion correct but which are so fine as to reflect no credit on this area of the law; and that it subverts the clear intention of Parliament.

The section 33 discretion

32 In resolving an application under section 33 the court must make a decision of which the inevitable effect is either to deprive the defendant of an accrued statute-bar defence or to stifle the claimant's action against the tortfeasor who caused his personal injuries. In choosing between these outcomes the court must be guided by what appears to it to be equitable, which I take to mean no more (but also no less) than fair, and it must have regard to all the circumstances of the case and in particular the six matters listed in subsection (3). These are, as Lord Diplock observed in *Thompson* [1981] 1 WLR 744, 751, "a curious hotchpotch", for reasons which he examined. But there is, as it seems to me, a problem underlying the whole of section 33: that it appears to treat the plaintiff and the defendant as individuals liable to suffer prejudice, and with no recognition that it is frequently the competing interests of insurers which will be liable to suffer prejudice. I cannot accept the suggestion by the MIB that the references to "or any person whom he represents" in subsections (1)(a) and (1)(b) are capable of referring to insurers, since a plaintiff and a defendant do not in any legal sense "represent" their insurers. Faced by this problem, but recognising the reality of insurance, the courts have routinely and rightly taken account of the parties' insurance rights. Thus a plaintiff's rights against his insured solicitor are very relevant (*Thompson*, p 752) but this does not mean that refusal of an order under section 33 will not prejudice him to some degree (*Thompson*, pp 750-751).

33 Given the rarity of its exposure to problems arising under section 33, the House cannot match the experience and insight which first instance judges and Lords Justices bring to bear on these problems. I do not therefore think it would be well-advised to seek to give guidance on the exercise of this discretion. If *Walkley* represents a very clear case for refusal to exercise the discretion, *Hartley v Birmingham City District Council* [1992] 1 WLR 968, 978-979, might be thought a clear case for its exercise: the writ was issued one day late; there had been early notification of the claim; and the defendant's ability to defend the case was unaffected. Thus even if the plaintiff had a cast-iron claim against her solicitors the limitation defence could fairly be regarded as a windfall or gratuitous bonus. Between these extremes lie a variety of cases turning on different facts.

34 In the present case Judge Cooke gave reasons for holding that, but for *Walkley*, he would have exercised his discretion in the appellant's favour. He alluded to an argument strongly relied on by the MIB and successfully advanced on its behalf in *Morris v Lokass* that as between the claimant's solicitors' professional indemnity insurers and the MIB the loss should fall on the former, who had received a premium, and not on the MIB, who had not. But he reminded himself of the court's duty to look at all the circumstances of the case, and noted that in the present case the delay after expiry of the three-year period was short and was caused by failure to meet the "technical but vital requirements" of clause 5(1)(a). Viewing the matter without reference to the appellant's claim against his solicitor's insurers, he found the balance to favour the appellant since the delay was small, the effect on the trial minimal and the MIB would lose a fortuitous limitation defence. He then considered whether the appellant's claim against his solicitor's indemnity insurers tilted the balance the other way. He noted in the MIB's favour that the appellant had an undisputed claim, whether against his solicitor or the MIB, and described the balance he had to strike as a fine one. But he concluded that the balance remained in the appellant's favour, since the MIB had been on notice of the claim, and had no evidential problem and were simply losing the windfall of a limitation defence, whereas the appellant would have to bring a further action against a new defendant.

35 On its cross-appeal, raised in case the appellant succeeded in his challenge to *Walkley*, the MIB criticised the judge's self-direction, contending that in the present case (unlike some other

A cases referred to) the appellant would suffer no prejudice at all if an order under section 33 were refused. (The MIB relied on the fact that, as the House was told, the appellant had, after the judgment against him in the county court, received payment from his solicitor's insurers. But since this occurred after the judgment
B it can have no bearing on the judge's exercise of discretion. In any event, the judge assumed that the appellant had a good claim.) It was urged by the MIB that the loss should fall on the insurer who had received a premium to provide cover against the very risk which eventuated. Had these points persuaded the judge
C his conclusion might well have been supportable. But he was guilty of no misdirection. He was entitled to see some prejudice to the appellant in having to make a new claim in which, even if liability was undisputed, the quantum of damages was not. In a straightforward case in which the appellant's delay was short and
D understandable and caused the effective defendant no forensic prejudice at all, the judge was in my opinion entitled to view a motor insurer (or in default, the MIB) as the primary source of compensation for the victim of a road traffic accident. I would give effect to his exercise of judgment.

E

Article 6 of the European Convention

36 It was argued for the appellant that the decision in *Walkley*, if upheld, violated article 6 of the European Convention by denying the appellant access to a court. In the event, this
F issue does not arise. Had it done so, I should have needed much persuasion to accept it. The appellant had untrammelled access to the court for three years after his injuries, of which he was fully aware. Had Parliament conferred no discretion on the court to extend time he could not, as he accepted, have complained. To
G the extent that *Walkley* unfairly gave better rights to some litigants than others, that is a defect calling for correction by Parliament or the domestic courts but involving, as I think, no violation of the appellant's Convention rights.

H *Abuse*

37 It was argued below and in the House that it was an abuse for the appellant to bring a second action while his first action was still extant. The judge accepted that in the ordinary
I way it is an abuse to pursue two actions against the same defendants in respect of the same subject matter and indicated

that if he were giving permission for the second action to continue he would require the first action to be discontinued. This was, I think, the correct response. As it was, he dismissed both actions.

Disposal

38 I would allow the appeal and dismiss the cross-appeal. The case must be remitted to the Salford County Court. The parties are invited to make written submissions on costs within 14 days.

LORD HOFFMANN

39 My Lords, this appeal raises two interesting questions on the principle of stare decisis. The first is whether the House should depart from its decision in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606. My Lords, it is with a reluctance verging on disbelief that one is driven to conclude that the deliberate opinions of Lord Wilberforce and Lord Diplock were quite wrong. Of each of them it may be said, as Viscount Simonds said of Lord Macnaghten when faced with a rather similar situation in *Public Trustee v Inland Revenue Comrs* [1960] AC 398, 409, that "to generations who have passed their lives in the law his is truly clarum et venerabile nomen". But, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, I think that they misconstrued what is now section 33 of the Limitation Act 1980.

40 But the fact that the House as now constituted would have decided *Walkley* differently is not a sufficient reason for departing from a decision which has stood for nearly 30 years and which the House has followed on two subsequent occasions. If the House in its judicial capacity has erred, it is usually better to leave it to Parliament to change the law prospectively than for the House to undo its mistake with retrospective effect. But the situation which has been created by *Walkley* falls squarely within Lord Reid's description in *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966 of a case in which it would be right for the House to depart from a previous decision:

> It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing: they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel

A bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law.

41 That describes exactly what has happened to *Walkley* in the B Court of Appeal. The grounds upon which it was distinguished in *In re Workvale Ltd* [1992] 1 WLR 416, *Shapland v Palmer* [1999] 1 WLR 2068 and *Adams v Ali* [2006] 1 WLR 1330 while no doubt technically correct, mean that the distinction between cases in which the discretion is or is not available is completely irrational. C So much so, that Mr Bartley Jones, on behalf of the claimant, suggested that on the facts of this case *Walkley* could be distinguished on the ground that the first action, in which the MIB denied liability because they had not been given proper notice, was different from the second action, in which they D accepted they would be liable. When asked how it could be rational to distinguish the actions on the basis of whether a third party would be willing to accept liability for the damages, he said that it was no more irrational than some of the distinctions which had been made in earlier cases. That, I fear, is true. The only E answer is to depart from *Walkley* and restore some consistency to this part of the law.

42 The second question is rather different. The 20th Report of the Law Reform Committee (Cmnd 5630) (1974) on which the Limitation Act 1975 was based, intended the discretion conferred F by what is now section 33 of the 1980 Act to be used only in a "residual class of cases": see para 56. But the statute as enacted was in very general terms. The court had to consider whether it would be "equitable" to allow the action to proceed, having regard to the "prejudice" which would be caused to the parties G by taking one course or the other and having regard to all the circumstances of the case, including in particular a list of factors including the extent to which the plaintiff (but not his advisers) acted "promptly and reasonably" once he knew that the injury might be capable of giving rise to an action for damages.

H

43 In *Firman v Ellis* [1978] QB 886, the Court of Appeal refused to confine the application of the discretion as the Law Reform Committee had intended. Ormrod LJ said, at p 898: "To bring in the report as an aid to construction is to introduce a I problem which cannot be solved, namely, how far Parliament meant to recognise or ignore the report."

44 The Court of Appeal held that the discretion was unfettered. Lord Denning MR said that it was a revolutionary step which "alters our whole approach to time bars". So it did. *Firman*'s case was on this point approved by the House of Lords in *Thompson v Brown* [1981] 1 WLR 744 and since then the practice of the courts has been regularly to exercise the discretion in favour of the plaintiff in all cases in which the defendant cannot show that he has been prejudiced by the delay. No matter how negligent the claimant's solicitors may have been in the simple skills of keeping a diary, the plea of limitation which the statute confers upon the defendant is, in the absence of forensic prejudice, described as a windfall of which he can properly be deprived.

45 Mr O'Brien, on behalf of the MIB, says that this is very unreasonable. The effect is to transfer to motorists' insurers (and through them, to the motoring public) a liability which, if the Limitation Act had been more strictly applied, would have been borne by solicitors' insurers. It is also inimical to good order and discipline in the solicitor's profession, because it enables solicitors to ignore the Limitation Act in the knowledge that their clients will not be put in the position of having to sue them for negligence.

46 These arguments raise questions of public policy of which the courts have always been conscious, although it cannot be said that their views on the matter have been consistent. For example, in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 256, Diplock LJ said of a plaintiff whose action had been struck out for want of prosecution because of delay by his solicitors:

> As regards the position of the plaintiff, it is of course unfortunate that he, though personally blameless, should suffer for the default of his agent. But if he does, he is not without a remedy, for unless he himself has caused or consented to the delay which has resulted in his action being dismissed for want of prosecution, he will have a right of action against his solicitor for negligence. Liability for professional negligence is a risk against which most solicitors insure.

47 Likewise, in *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260, 264 Lord Diplock said that a plaintiff whose claim was barred by the rule in *Walkley*'s case could not complain of unfair treatment: "The plaintiff herself will not suffer ... The solicitors' insurers will have to pay out for a risk that they insured and for which they charged a premium; so they have suffered no injustice."

48 On the other hand, in *Thompson v Brown* [1981] 1 WLR 744, 750 Lord Diplock did not think that an action for negligence against the solicitor was sufficient to prevent the limitation period from operating to his prejudice:

> even where ... if the action were not allowed to proceed the plaintiff would have a cast-iron case against his solicitor in which the measure of damages will be no less than those that he would be able to recover against the defendant if the action were allowed to proceed, some prejudice, although it may be only minor, will have been suffered by him. He will be obliged to find and to instruct new and strange solicitors; there is bound to be delay; he will incur a personal liability for costs of the action up to the date of the court's refusal to give a direction under section 2D; he may prefer to sue a stranger who is a tortfeasor with the possible consequences that may have on the tortfeasor's insurance premiums rather than to sue his former solicitors with corresponding consequences on their premiums.

49 There are, one can see, arguments on both sides. But they raise questions of general public policy which in my opinion are more appropriate for parliamentary than for judicial decision. The motor insurance industry and the motoring public are not without a political voice and if it is thought appropriate to shift the burden from one group of insurers to another, it is up to them to persuade Parliament to do so. For the moment, we have many years of settled jurisprudence on how the discretion should be exercised which I think it would be wrong to disturb. The manner in which Judge Cooke said that he would have exercised his discretion seems to me well within the principles and guidelines laid down by the decisions of the Court of Appeal and, now that your Lordships have decided that he had a discretion, it should in my opinion be given effect. I would therefore allow the appeal and dismiss the cross-appeal.

LORD RODGER OF EARLSFERRY

50 My Lords, I have had the advantage of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I agree with it and, for the reasons he gives, I too would allow the appeal and dismiss the cross-appeal.

LORD CARSWELL

51 My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Bingham of Cornhill. I am in full agreement with his reasons and conclusions in respect of the appeal, which I too would allow. It

is for those reasons time for the House to depart from its earlier decision in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606, a decision which many people, myself included, have long thought to be based on flawed logic and capable of causing signal unfairness. Once it is out of the way, as the result of the present appeal, then the issue between the claimant and the Motor Insurers' Bureau falls to be decided by reference to the discretion conferred on the trial judge by section 33 of the Limitation Act 1980. The reasons on which Lord Diplock and the other members of the House relied in *Walkley* as grounds for holding that a claimant in a case such as the present appeal could not bring himself within section 33 (or its predecessor) may still be relevant as factors in the exercise of the judge's discretion, but they should rank as no more than factors.

52 In his judgment given on 7 May 2003 on the preliminary issues Judge Cooke stated that were he to exercise the discretion under section 33 he would have exercised it in favour of disallowing the limitation period in the second claim, that is to say, he would have allowed the action commenced out of time to proceed. He conducted a careful exercise of considering the competing factors and weighing them against each other. Of the statutory factors set out in section 33 he regarded as directly applicable only (a) length and reasons for delay (b) staleness of evidence. He went on to say:

> In this case (b) really has no effect and as to (a) the length of delay since the expiry of the period is short and the reasons for the delay are the failure to meet the technical but vital requirements to make the first claim effective. If one viewed the case in the round without the factor of a claim against the solicitors' insurers I would have thought that the balance would come firmly down in favour of the claimant. The delay is very small, the effect on the trial is minimal, the MIB has lost a fortuitous limitation defence the claimant has lost his chance of having his judgment met by the MIB. All, I would have thought point one way.

53 The judge went on to consider whether the claim against the solicitors' indemnity insurers tilted the balance. He referred to a number of previous cases which in his view supported the proposition that it should not. I do not think that there is much to be gained from an extended review of these cases, all of which were opened to us by counsel, for to a considerable degree all such cases turn on their particular facts. A few observations may,

however, be worth making. (a) The prejudice to the claimant by the operation of the limitation provision and the prejudice to the defendant if it is disapplied tend, as Parker LJ pointed out in *Hartley v Birmingham City District Council* [1992] 1 WLR 968, 979, to be equal and opposite. He regarded the effect of the delay on the defendant's ability to defend as being of paramount importance. (b) In *Das v Ganju* [1999] Lloyd's Rep Med 198, 204 and *Corbin v Penfold Metallising Co Ltd* [2000] Lloyd's Rep Med 247, 251, the Court of Appeal expressed the view that there was no rule that the claimant must suffer for his solicitor's default. If this is interpreted, as it was in *Corbin*, as meaning that the court is not entitled to take into account against a party the failings of his solicitors who let the action go out of time, that could not in my view be sustained and the criticism voiced in the notes to the reports of *Das* and *Corbin* would be justified. The claimant must bear responsibility, as against the defendant, for delays which have occurred, whether caused by his own default or that of his solicitors, and in numerous cases that has been accepted: see, e g, *Firman v Ellis* [1978] QB 886, *Thompson v Brown* [1981] 1 WLR 744 and *Donovan v Gwentoys Ltd* [1990] 1 WLR 472. The reason was articulated by Ward LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, 1675, a case of striking out, when he said:

> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr McGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other.

(c) That said, whereas the claimant will suffer obvious prejudice if the limitation period is not disapplied, this may be reduced by his having a cause of action in negligence against his solicitors. The extent of that reduction will vary according to the circumstances, but even if he has an apparently cast-iron case against the solicitors the factors referred to by Lord Diplock in *Thompson v Brown,* at p 750, require to be borne in mind. (d) Judge Cooke was urged to agree with the proposition accepted in *Morris v Lokass* (unreported) 17 February 1003, that the loss should fall on

the insurers who had accepted a premium for the risk which has caused the claimant the relevant loss (the solicitor's professional liability insurers) and not on the MIB who have collected no such premium. The judge expressed himself as unpersuaded by that argument, and in my view he was correct in this. The MIB entered into their first agreement with the Minister of Transport in 1946 and the subsequent agreements for their own good reasons, and for the purposes of considering applications of the present nature they should not be regarded differently from motor insurers or professional liability insurers.

54 The judge carried out the exercise of balancing the prejudice on each side and concluded:

> In my judgment that particular balance is a fairly fine one but I think it resolves into a finding (as I would make) that the MIB who have been on notice of the claim and have no problems over evidence that they did not have before are simply losing the windfall of a limitation defence while the claimant has to bring yet further litigation against a new defendant. So balanced I think it comes down in favour of the claimant.

55 At the conclusion of the hearing I felt some doubt whether Judge Cooke's conclusion should be sustained. I was unsure that he had given sufficient weight to the strength of the appellant's case against his solicitors (which has been borne out by the fact that their insurers have already settled with him, but that fact post-dated the judge's consideration of the application and one should not take it into account now). I also felt that it might not be inappropriate to mark the fact that the solicitor's mistake was very elementary. Any solicitor who undertakes a road accident case for a claimant has to be aware that he must serve notice on the insurers of the bringing of the proceedings to trigger their obligation to meet a judgment; and if there is no insurer on risk, involve the MIB and serve the necessary notice under clause 5(1) of the MIB Agreement of 21 December 1988. These are such basic requirements that failure to fulfil them can only be regarded as a serious piece of professional negligence.

56 On reflection, however, I have come to the view that Judge Cooke's decision should not be upset. It was carefully considered, by reference to the correct factors, and it is not for this House to reverse it lightly, whatever conclusion the several members of the committee might have reached if hearing the application de novo. Nor do I think, on similar reflection, that the seriousness of

A the solicitors' error should weigh in the balancing exercise under section 33, which should assess the prejudice to the respective parties. I also consider that decisions by judges who deal regularly with applications of this nature should carry substantial weight, and that the Court of Appeal is well equipped to oversee them
B and lay down any necessary guidelines.

57 I accordingly agree the appeal should be allowed and the cross-appeal dismissed.

C
LORD BROWN OF EATON-UNDER-HEYWOOD

58 My Lords, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, with which I am in complete agreement, I too would allow this appeal. I agree also with the opinions of my noble and learned friends, Lord Hoffmann and
D Lord Carswell. This short judgment I add simply because in the Court of Appeal I myself had so frequently to grapple with the intractable problems which inevitably followed upon the House's ruling in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606.

59 *Walkley* decided that upon the true construction of section
E 33 of the Limitation Act 1980 (like Lord Bingham I refer for convenience only to the current sections) section 11 (which imposes a three-year time limit on personal injury actions) can never (the subsequent decision of the House in *Deerness v John R Keeble & Son (Brantham) Ltd* [1983] 2 Lloyd's Rep 260,
F recognised that the *Walkley* ruling logically admits of no exceptions) "prejudice the plaintiff" in any action for damages for injuries in respect of which he had previously issued proceedings within the primary limitation period. In these circumstances, the House ruled, the plaintiff is not prejudiced by the operation of section 11 but
G only by his failure to bring his earlier timeous claim to a judgment on the merits-whether through a failure to serve it or through delays in its prosecution leading to strike out or through discontinuance for whatever reason.

H **60** What is difficult to understand, however, is why on this approach it would not be equally correct to say that the plaintiff was not prejudiced by section 11 even in a case where he had issued no proceedings in the primary limitation period. Why should it not be said then that his only prejudice is through that failure?
I The effect of that, of course, would be to negate section 33

entirely and unsurprisingly the House in *Thompson v Brown* [1981] 1 WLR 744 rejected such a conclusion. The way it was put by Lord Diplock, at pp 752-753, was:

> It may seem anomalous that a defendant should be better off where, unknown to him, a writ has been issued but not served than he would be if the writ had not been issued at all; but this is a consequence of the greater anomaly too well-established for this House to abolish that, for the purposes of a limitation period, an action is brought when a writ or other originating process is issued by the central office of the High Court and not when it is brought to the knowledge of the defendant by service upon him.

61 What Lord Diplock appears there to be saying is that whether or not the section 33 discretion exists should logically depend upon whether the defendant actually knows of the issue of timeous proceedings against him: if he knows within the primary limitation period that a claim has been brought, then (but not otherwise) he should justifiably be safeguarded against the possibility of a second action being brought against him out of time.

62 My recollection is that some such thought process underlay my own throwaway remark in *Young, decd v Western Power Distribution (South West) plc* [2003] 1 WLR 2868, 2883, at para 56, that "the [*Walkley*] principle may after all not be quite so anomalous and unfair as hitherto it has been characterised". As it now seems to me, however, there could be no justification whatever for the existence of the section 33 discretion to depend upon whether or not the defendant knew of an initial action brought within time. Why should he feel any more secure against a possible claim out of time (necessarily by second action) because he knew of a first action brought in time than if he had heard nothing whatever of a proposed claim against him within the primary limitation period?

63 The curious but plain fact is that in *Walkley* Homer nodded: an impossible and illogical construction was put upon the section. The House's mistaken approach appears clearly from the passage in Lord Diplock's speech cited by Lord Bingham at para 16 above. In stating there that a plaintiff who has already brought a first action in time "has not been prevented from starting *his action* by section [11] ... he was able to start *his action*" (emphasis added), Lord Diplock appears to have confused or conflated the two separate sets of proceedings: it is not the first action in which

A the plaintiff is prejudiced by the time bar but the second; and it is the second action for which the plaintiff seeks the favourable exercise of the court's section 33 discretion "to allow an action to proceed having regard to the degree to which ... the provisions of section 11 ... prejudice [him]".

B

64 It is for the very reason that the *Walkley* ruling is so lacking in logic and intrinsically productive of anomalies that the courts have found such difficulty in its subsequent application. There is simply no coherent principle by which to judge its true scope and C how in any particular case which raises the smallest factual distinction it should apply. Small wonder that it has given rise to so much unsatisfactory jurisprudence.

65 In *R v National Insurance Comr, Ex p Hudson* [1972] AC 944 the House divided 4:3 upon whether, pursuant to its *Practice* D *Statement (Judicial Precedent)* [1966] 1 WLR 1234, to depart from a previous decision bearing in mind that there, as most of the committee accepted, there were two tenable views as to the proper construction of the statute in question. Here by contrast section 33 admits of only one tenable construction – not, E unfortunately, that afforded to it by the House in *Walkley*. There can be no doubt that both justice and certainty would be advanced by the House now departing from the *Walkley* ruling. That it has stood for so long is a pity. It is certainly no reason to F perpetuate it any longer.

Appeal allowed.
Cross-appeal dismissed.
Case remitted to county court.

G *Solicitors: Sharpe Pritchard for Rowe Cohen, Manchester, Weightmans, Liverpool.*

DECP

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